CORD
AND
RIEFS.

Supreme Court, U.S.
FILED
NOV - 1 2016
OFFICE OF THE CLERK

No. 15-1504

IN THE

Supreme Court of the United States

RUSSELL L. OVERTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

MICHAEL E. ANTALICS
(Counsel of Record)
mantalics@omm.com
KEVIN D. FEDER
DEANNA M. RICE
SAMANTHA M. GOLDSTEIN
WYATT FORE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Admitted only in Virginia; supervised by principals of the firm.

Attorneys for Petitioner

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

A. The Decision Below Conflicts With This Court's *Brady* Jurisprudence 2

B. The Suppressed Evidence Is Material When Analyzed Under The Correct Legal Standard 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Brady v. Maryland,
373 U.S. 83 (1963) 2

Hammond v. Hall,
586 F.3d 1289 (11th Cir. 2009) 9

Kyles v. Whitley,
514 U.S. 419 (1995) ..... *passim*

Sears v. Upton,
561 U.S. 945 (2010) 3

Smith v. Cain,
132 S. Ct. 627 (2012) 5

United States v. Agurs,
427 U.S. 97 (1976) 6

United States v. Bagley,
473 U.S. 667 (1985) 2, 4, 8

United States v. Perez,
280 F.3d 318 (3d Cir. 2002) 9

United States v. Zuno-Acre,
44 F.3d 1420 (9th Cir. 1995) 9

Wearry v. Cain,
136 S. Ct. 1002 (2016) 2, 5

RULES

S. Ct. R. 10(c) 1

REPLY BRIEF FOR PETITIONER

This case is not about petitioner Russell Overton's mere "disagreement" (Opp. 16) with how the D.C. Court of Appeals applied *Brady* to the facts of his case, but about the serious legal errors the court committed by deviating from this Court's *Brady* jurisprudence. The court below required Overton to show that the suppressed evidence "would have led the jury to doubt *virtually everything*" about the case against him. According to the government, there is no tension between that approach and this Court's precedents. The Court, however, has held that evidence is material under *Brady*—and constitutional error results from its suppression—if "there is *any* reasonable likelihood that it could have affected the judgment of the jury." The court of appeals' approach cannot be reconciled with that standard. *See* S. Ct. R. 10(c).

To be sure, Overton's petition requires the Court to consider how *Brady* applies on the facts of his case. But that does not mean that it presents a "factbound attack" on the lower court's decision. To the contrary, the court of appeals broke with decades of Supreme Court case law that protects criminal defendants' due process rights, deepening the confusion in the lower courts regarding the correct *Brady* materiality standard. The facts of the case—including that the jury repeatedly deadlocked before finding Overton guilty, and that the government withheld an eyewitness identification of a lone, alternative assailant, as well as multiple identifications of another man known by the government to have serially attacked other women in the same

neighborhood fleeing the crime scene and concealing something under his coat—simply illustrate the severity and significance of the court of appeals' legal error. This case implicates the core values *Brady* protects, and those values are too important—to Overton, to other defendants, and to the criminal justice system writ large—to permit the decision below to stand.

Certiorari should be granted.

A. The Decision Below Conflicts With This Court's *Brady* Jurisprudence

Under *Brady v. Maryland*, 373 U.S. 83 (1963), evidence is "material" if there is "any reasonable likelihood it could have affected" the outcome of the case. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quotation omitted); *see United States v. Bagley*, 473 U.S. 667, 677 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The court of appeals, however, held that for Overton to succeed on his *Brady* claim, he had to demonstrate a reasonable probability that the suppressed evidence "would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." Pet. App. 58a. Contrary to the government's suggestion (Opp. 22), that holding was not the "only logical" approach to Overton's case; it was a plainly erroneous interpretation of this Court's

longstanding *Brady* case law, which requires no such showing. *See* Pet. 15-22.

The government's response repeats the court of appeals' analytical errors. Most easily dispatched is the government's conclusory assertion that the court did not apply the sort of sufficiency-of-the-evidence review that this Court has deemed inconsistent with *Brady*. The government relies exclusively on the court's recitation of the correct standard at the outset of its analysis, *see* Opp. 24-25, but as explained in the petition (Pet. 18 n.8), such a superficial recital cannot insulate a decision from review where, as here, the record shows that the court actually applied a different—and unconstitutional—standard. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 952 (2010) (per curiam); *Kyles*, 514 U.S. at 440.[1]

The government is also wrong in claiming that the "virtually everything" standard makes sense in this (or any other) case. The government says that approach was logical here because the suppressed evidence "would not have directly contradicted the government's witnesses or shown them to be lying, and did not tend to show that any given [petitioner] was misidentified." Opp. 21 (quotation omitted; alteration in original). Suppressed evidence, however, need not disprove the evidence proffered by the government to be material under *Brady*. *See* Pet. 17-18. To the contrary, the Court in *Kyles* found suppressed

---

[1] The government's argument that the court of appeals conducted a proper cumulative analysis (Opp. 27-28) suffers from a similar defect. Although the court claimed to consider the cumulative effect of the suppressed evidence, in substance it did nothing of the sort. *See* Pet. 22-30.

evidence material even though "not every item of the State's case would have been directly undercut if the ... evidence had been disclosed"—and, indeed, significant physical evidence would have remained "unscathed." 514 U.S. at 451.

The relevant question is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see Kyles*, 514 U.S. at 434 ("reasonable probability" of a different result shown when the evidentiary suppression "undermines confidence in the outcome of the trial"). And as explained in the petition, here the suppressed evidence would have weakened the prosecution's already feeble case against Overton. That evidence both undermined the government's group-attack theory of the crime, Pet. 25-29, and made it highly unlikely that the jury would have found that Overton in particular attacked Mrs. Fuller, regardless of whether it concluded that the crime was perpetrated by a group, *id.* at 29-30.

To evade the plain import of the suppressed evidence, the government (like the court below) offers reasons why a jury *might* have discounted it. *E.g.*, Opp. 25-27 & n.10; *see* Pet. 18-20.[2] The government

---

[2] The government says the court below did not reject the McMillan evidence (placing a man who was serially attacking women in the neighborhood at the crime scene) for that reason, but because "even if it would have cast some suspicion on McMillan, the jury would have had no substantial reason to suspect McMillan was the *sole* perpetrator or one of only a few assailants, rather than another member of petitioners' group." Opp. 27 (quotations omitted). Yet the court repeatedly suggested that the jury could have disregarded the evidence alto-

insists that such speculation is permissible—even required—because *Brady* "asks whether there is a reasonable probability that withheld evidence would have affected the verdict," making "some hypothesizing ... inevitable." Opp. 25 (quotation omitted). But the critical point of the "reasonable probability" standard (and the rest of this Court's *Brady* jurisprudence) is that a defendant need only show a *reasonable probability*—not prove to certainty—that the withheld evidence could have changed the outcome. *See, e.g.*, *Kyles*, 514 U.S. at 434. Were it otherwise, it would be virtually impossible for any defendant to prevail on a *Brady* claim.

The "reasonable probability" standard, moreover, explains only why it is necessary to hypothesize about how the suppressed evidence could have affected the outcome of the case. It does not authorize a court to hypothesize about why the jury might have disbelieved the suppressed evidence while ignoring reasons it might not have. *Wearry*, 136 S. Ct. at 1007; *see Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (possibility that "the jury *could* have disbelieved" undisclosed evidence does not create "confidence that it *would* have" done so). Tellingly, the government responds to *Smith* and *Wearry*'s admonitions on this point by retreating to the empty truism that, "in deciding a *Brady* claim, courts must evaluate the 'reasonable probability' of a different outcome" (Opp. 25)—the very standard on which *Smith* and *Wearry*

---

gether, speculating, for example, that the jury might have concluded that McMillan simply "heard about the attack and decided to look in out of curiosity." Pet. App. 55a n.81; *see* Pet. 19-20.

elaborate. The government's refusal to seriously engage with *Smith* and *Wearry*, like much of its flawed argument, confirms that the only way to reconcile the court of appeals' analysis with *Brady* is to ignore this Court's precedents applying it.

B. The Suppressed Evidence Is Material When Analyzed Under The Correct Legal Standard

The flaws in the "virtually everything" standard applied below are particularly apparent in a close case like this one. *See United States v. Agurs*, 427 U.S. 97, 113 (1976). Yet the government pays almost no attention to the specific facts of Overton's case, instead treating Overton and his co-defendants as a homogenous group. And when the government *does* address Overton in particular, it offers less than a page of conclusory analysis. Opp. 30.

Ultimately, it is only by overlooking the substantial weaknesses in the prosecution's case against Overton and the significance of the suppressed evidence that the government is able to argue that the court of appeals' legal errors were insignificant as to him. At least three critical gaps in the government's analysis warrant special attention:

First, the government does not grapple with the fact that, after convicting six of Overton's co-defendants and acquitting two, the jury declared a unanimous verdict against Overton "impossible." Pet. 8. Nor does the government acknowledge that the trial court had to instruct the jury to keep deliberating, or that it was only after forty to fifty more votes and further claims of impasse that the jury ultimately convicted him. *See id.* The jury's struggle

to reach a verdict for Overton establishes that it already had reservations about the evidence against him. *Id.* at 8, 23.

Second, the government nowhere confronts the logical implications of the jury's decision to acquit one of Overton's co-defendants, Alphonso Harris. *See* Opp. 6 n.3 (sole mention of Harris's acquittal). The case against Overton came primarily from three witnesses who claimed to have seen him participate in the attack—Calvin Alston, Harry Bennett, and Carrie Eleby—all of whom had serious credibility problems. Pet. 5. And the jury acquitted Harris, who both Alston and Bennett identified as an active participant in the crime. *Id.* at 5-6. Harris's acquittal confirms beyond question that the jury had doubts about Alston and Bennett's testimony, even without the suppressed evidence. *Id.* at 5-6, 29. The government is thus simply wrong to suggest that "it [i]s exceedingly unlikely that the jury would have rejected overwhelming eyewitness testimony—including from two participants in the crime [Alston and Bennett]." Opp. 26.

Third, the government offers no reason why the Eleby impeachment evidence could not have tipped the balance in Overton's favor. Eleby was the only purported eyewitness to the attack who testified against Overton but not Harris. Pet. 29. It accordingly could well be the case that Eleby's testimony alone explains why Overton was convicted while Harris was not. *Id.* And the government knew, but did not disclose, that Eleby convinced another witness to lie to investigators to implicate another defendant in the crime. *Id.* at 12-13. That withheld

information suggests not just a poor memory, but an affirmative effort to manufacture false evidence—a wholly different type of impeachment that alone could have resulted in Overton's acquittal. *Id.* at 29-30.

In response, the government suggests only that this Court should not question the court of appeals' "factbound conclusion" about whether further impeachment of Eleby could have affected the result of Overton's trial. Opp. 30. But the facts that the jury acquitted Harris despite Alston and Bennett's testimony against him, and that Eleby was the only additional witness to identify Overton as a participant in the attack, demonstrate why the *legal* standard applied by the court below cannot be correct. Under that test, even evidence that conclusively discredited all of Eleby's testimony would not have been "material" to Overton's case, because it would have left Alston and Bennett's testimony undisturbed and thus would not "have led the jury to doubt virtually everything that the government's eyewitnesses said." Pet. App. 58a (emphasis omitted). Yet there undoubtedly would be a "reasonable probability [that] the result of the proceeding would have been different" in those circumstances, *Bagley*, 473 U.S. at 682, because the jury *already* disbelieved aspects of Alston and Bennett's story, acquitting Harris and repeatedly deadlocking as to Overton.

The McMillan, Luchie, and Blue evidence, too, might have led to an acquittal. The government does not and cannot dispute that alternative-perpetrator evidence is quintessential *Brady* material. *See* Pet. 26 (citing cases). Instead, the govern-

ment argues that McMillan and Blue were not "credible" alternative perpetrators, making the information about them immaterial here. Opp. 23-24 & n.9. That argument, however, not only ignores the likely effects of the suppressed evidence in this case, but is also rooted in non-binding lower court cases involving circumstances dissimilar to those here.

Hammond v. Hall, 586 F.3d 1289 (11th Cir. 2009), is illustrative. There, the court concluded that the suppressed confession of a man other than the defendant was not material because the confessor's statements were "demonstrably false," he was "completely wrong about every important fact that he shared with police," and the defendant's own counsel admitted that the case against him was "extraordinarily strong." *Id.* at 1318-20.[3]

Here, by contrast, the suppressed evidence was not "demonstrably false." For example, three separate witnesses identified McMillan acting suspiciously in the alley where Mrs. Fuller was killed not long after the attack. Pet. 10-11. And the lead prosecutor

---

[3] The government's other cases are largely similar. *See, e.g.*, *United States v. Perez*, 280 F.3d 318, 350 (3d Cir. 2002) (co-conspirator's statement claiming someone other than defendant delivered drugs immaterial where same co-conspirator made statement inculpating defendant that "was fully and powerfully corroborated" by defendant's passport and travel itinerary and testimony of two other individuals); *United States v. Zuno-Acre*, 44 F.3d 1420, 1426-30 (9th Cir. 1995) (statement that victim's torture and murder were motivated by love, not money, immaterial where jurors heard recorded interrogation that "obtain[ed] by excruciating torture two days of details affecting the business of the narcotics gang" and two witnesses testified that the motive for the crime was the victim's "knowledge of the cartel's activities").

considered McMillan a suspect. *Id.* at 11; *see also* A2320-21.

The case against Overton, meanwhile, was by no means "extraordinarily strong." The suppressed evidence accordingly would not have needed to shift the balance between the prosecution and the defense very far to create a reasonable probability of a different outcome. The evidence withheld here would have done more than that.

The McMillan evidence, for instance, placed a man who had serially attacked other women in the neighborhood where Mrs. Fuller was killed at the crime scene shortly after her death. Pet. 25. And it indicated that that man fled the crime scene while concealing something—possibly the missing object used to sodomize the victim—under his coat. *Id.*; *see also id.* at 25-26 (discussing similar importance of Luchie evidence).[4]

The Blue evidence, too, would have weakened the government's case and strengthened Overton's defense. *Id.* at 26-28. Davis identified Blue, a "habitual criminal" with a record of arrests for rape, sodomy, and armed robbery, as Mrs. Fuller's lone killer.

---

[4] The government speculates that the McMillan evidence was immaterial because evidence about his presence in the alley was admitted at trial. Opp. 28. But evidence *identifying* McMillan as one of the men on the scene was never disclosed, and that information was fundamentally different from the information known to the defense at trial. McMillan's *identity* in particular was significant, given his history of robbing and assaulting women in the neighborhood where Mrs. Fuller was robbed and murdered, when combined with testimony that McMillan was in the vicinity of the murder on the day it occurred.

Id. at 9. Davis's statement was corroborated by a number of independent facts. *Id.* at 9-10. It is accordingly unsurprising that the government does not dispute that it had an obligation to timely disclose Davis's statement so the defense could make meaningful use of it. *See id.* at 27. The government instead suggests that, even if it had done so, defense counsel would not have uncovered anything helpful as a result, because the government's own efforts to locate a witness to corroborate Davis's claims were fruitless. Opp. 23 n.9. That reasoning ignores that the defense could have located the woman Davis said she was with when she saw Blue kill Mrs. Fuller. Pet. 27. And it cannot be squared with the adversarial nature of the criminal justice system, which grants the defendant the right and responsibility to develop his own case. *See, e.g.*, *Kyles*, 514 U.S. at 440. Adherence to such principles is nowhere more critical than in a case like this one, where the government failed to follow up on Davis's identification of Blue for months—which itself suggests that the government's investigation was deficient. *See* Pet. 27-28.

As with the suppressed impeachment evidence, the government mischaracterizes Overton's argument about the alternative-perpetrator evidence as a factbound attack on the court of appeals' decision. But as explained above and in the petition, that decision is awash with legal error. Of course, in essentially any *Brady* case, the factual context in which the claim arose is a component of the analysis. But that does not mean *Brady* cases are categorically beyond the purview of this Court's review, as the

Court's numerous decisions applying and clarifying the *Brady* standard make plain.

The Court should not allow such a marked deviation from its precedents to stand. The decision below will create confusion regarding *Brady* for years to come, in the District of Columbia and elsewhere. Worse yet, the erosion of *Brady*'s core protections reflected in that decision implicates nothing less than the fairness, accuracy, and integrity of the criminal justice system as a whole. *See id.* at 4, 15, 30-33. Indeed, the court of appeals' errors are so obvious, and the interests at stake so important, that the Court may wish to consider summary reversal as an alternative to granting full review. *See id.* at 33-35.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. ANTALICS
(Counsel of Record)
mantalics@omm.com
KEVIN D. FEDER
DEANNA M. RICE
SAMANTHA M. GOLDSTEIN
WYATT FORE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

**Admitted only in Virginia; supervised by principals of the firm.*

November 1, 2016